DJH

267 NLRB No. 184

D--1124
Stratford, CT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLONIAL TOYOTA, INC.

and

Case 39--CA--1432

BREWERY WORKERS, SOFT DRINK WORKERS, LIQUOR DRIVERS & NEW & USED CAR WORKERS, LOCAL 1040, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

DECISION AND ORDER

Upon a charge filed on 22 November 1982 by Brewery Workers, Soft Drink Workers, Liquor Drivers & New & Used Car Workers, Local 1040, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on Colonial Toyota, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Officer-in-Charge for Subregion 39, issued a complaint on 1 December 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor

Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 21 October 1982, following a Board election in Case 39--RC--333, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about 16 November 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive barqaining representative, although the Union has requested and is requesting it to do so. On 15 December 1982 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 3 January 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 10 January 1983 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

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[1] Official notice is taken of the record in the representation proceeding, Case 39--RC--333, as the term ''record'' is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Notice To Show Cause, Respondent essentially denies the validity of the Union's certification and asserts it is not required to recognize or bargain with the Union. It claims that the Regional Director erred in ruling on a challenged ballot and in refusing to sustain its objection to the election.

The General Counsel submits that Respondent is attempting to litigate issues which were raised and determined in the representation proceeding. We agree.

Review of the record herein reveals that on 19 May 1982 the Union filed a petition in Case 39--RC--333 seeking to represent certain employees at Respondent's Stratford, Connecticut, facility. After a hearing and consideration of Respondent's post-hearing brief, the Regional Director for Region 1 on 30 June 1982 issued a Decision and Direction of Elections among the employees in the unit found appropriate, including the finance and business manager.[2] Thereafter, Respondent filed a request for review of

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[2] Crabtree-Haas Toyota, Inc., Case 39--RC--332, was consolidated with Case 39--RC--333 for hearing, but the petition in the former case was withdrawn on 14 July 1982, pursuant to the Union's request.

the Regional Director's decision, contending that the Regional Director erred in finding that the finance and business manager is not a supervisor as defined in the Act. On 23 July 1982 the Board denied Respondent's request for review.

Pursuant to the Decision and Direction of Elections, a secret-ballot election was held on 30 July 1982, which resulted in a tally of three votes for, and two votes against, the Union, and one challenged ballot, a number sufficient to affect the results of the election. Respondent filed a timely objection, alleging that the Regional Director erred in refusing its request to reschedule the election.

After an investigation, the Regional Director issued a Supplemental Decision in which he overruled Respondent's objection and the challenge to the ballot cast by J. Fred Kuhn, Jr., Respondent's finance and business manager. Thereafter, Respondent filed a request for review of the Regional Director's Supplemental Decision, contending that the Regional Director erred in overruling the objection and the challenge to the ballot of Kuhn. On 30 September 1982 the Board denied Respondent's request for review. On 15 October 1982, pursuant to said Supplemental Decision, the ballot of J. Fred Kuhn, Jr., was opened and counted. The revised tally revealed that, of approximately six eligible voters, four cast ballots for, and two cast ballots against, the Union. On 21 October 1982 the Regional Director issued a Certification of Representative.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a

respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[4] Accordingly, we grant the Motion for Summary Judgment.[5]

On the basis of the entire record, the Board makes the following:

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[3] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] Respondent's answer denies the request and the refusal to bargain. Attached to the General Counsel's Motion for Summary Judgment is a letter from the Union's secretary-treasurer requesting a ''contract negotiating meeting'' and a letter from Respondent's attorney stating that Respondent does not believe the certification to be proper. In its response to the Notice To Show Cause, Respondent neither alludes to nor controverts the letters attached to the Motion for Summary Judgment. Thus, the truth of the factual allegations in the complaint concerning the request and the refusal to bargain stands admitted by the uncontroverted factual averments in the General Counsel's motion. Schwartz Brothers, Inc., and District Records, Inc., 194 NLRB 150, fn. 5 (1971), enfd. 475 F.2d 926 (D.C. Cir. 1973).

[5] Chairman Dotson was not on the Board at the time of the prior proceedings and therefore expresses no opinion as to these prior proceedings; he votes to grant summary judgment only on a procedural basis.

## Findings of Fact

### I. The Business of Respondent

Respondent is now, and has been at all times material herein, a Connecticut operation with an office and place of business in Stratford, Connecticut, where it has been engaged in the retail sale of new and used cars. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $500,000. In so doing, Respondent anually purchases and receives at its Stratford facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Connecticut.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. The Labor Organization Involved

Brewery Workers, Soft Drink Workers, Liquor Drivers & New & Used Car Workers, Local 1040, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

## III. The Unfair Labor Practices

### A. The Representation Proceeding

#### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All salespersons and the finance and business manager employed by Colonial Toyota, Inc., at its Stratford, Connecticut facility, excluding all office clerical employees, service department employees, parts department employees, managerial employees, and guards, professional employees and supervisors as defined in the Act.

#### 2. The certification

On 30 July 1982 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on 21 October 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

### B. The Request To Bargain and Respondent's Refusal

Commencing on or about 29 October 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 16 November 1982, and continuing at all times thereafter to date, Respondent has refused, and continues

to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 16 November 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining

agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Colonial Toyota, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Brewery Workers, Soft Drink Workers, Liquor Drivers & New & Used Car Workers, Local 1040, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All salespersons and the finance and business manager employed by Colonial Toyota, Inc., at its Stratford, Connecticut facility, excluding all office clerical employees, service department employees, parts department employees, managerial employees, and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 21 October 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 16 November 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Colonial Toyota, Inc., Stratford, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Brewery Workers, Soft Drink Workers, Liquor Drivers & New & Used Car Workers, Local 1040, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All salespersons and the finance and business manager employed by Colonial Toyota, Inc., at its Stratford, Connecticut facility, excluding all office clerical employees, service department employees, parts department employees, managerial employees, and guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay,

wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Stratford, Connecticut, facility copies of the attached notice marked ''Appendix.''[6] Copies of said notice, on forms provided by the Officer-in-Charge for Subregion 39, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

# APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Brewery Workers, Soft Drink Workers, Liquor Drivers & New & Used Car Workers, Local 1040, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All salespersons and the finance and business manager employed by Colonial Toyota, Inc., at its Stratford, Connecticut facility, excluding all office clerical employees, service department employees, parts department employees, managerial employees, and guards, professional employees and supervisors as defined in the Act.

COLONIAL TOYOTA, INC.
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(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 750 Main Street, 12th Floor, Hartford, Connecticut 06103, Telephone 203--722--3373.

(c) Notify the Officer-in-Charge for Subregion 39, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. 26 August 1983

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Donald L. Dotson, Chairman

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Howard Jenkins, Jr., Member

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Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD